

THE AMBRIOLA CO.
CORP. TAX DET.
1975

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of Petition :
 of :
THE AMBRIOLA COMPANY :
for refund of franchise tax :
under Article 9-A of the tax :
law for the fiscal year ended :
August 31, 1972 :

The taxpayer herein having filed a petition for refund of franchise tax under Article 9-A of the tax law for the fiscal year ended August 31, 1972, and a hearing having been held at the office of the State Tax Commission, 2 World Trade Center, New York City, at which hearing S. Israel, certified public accountant, appeared and the record having been duly examined and considered by the State Tax Commission,

It is hereby found:

(1) The taxpayer, an importer and wholesaler of cheese and other food products, was incorporated in Ohio on December 6, 1928 and began doing business in New York State on May 10, 1965. It owned a vacant building in Ohio which had been acquired in 1928. The building was destroyed by fire and an insurance settlement of \$80,000 was received resulting in a capital gain of \$61,879, which was required to be included in federal taxable income. The taxpayer eliminated such capital gain in reporting entire net income on its New York State return. The Corporation Tax Bureau issued a statement of audit adjustment and notice of deficiency restoring the capital gain to entire net income, resulting in a deficiency of \$5,508.35. The taxpayer paid the deficiency and filed a petition for refund.

(2) The taxpayer did not file an income or franchise tax return with any other state for the FYE 8/31/72.

(3) Section 208.9 of the tax law provides, in part:

"The term 'entire net income' means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, . . . except as hereinafter provided, and subject to any modification required . . . "

None of the exceptions or modifications in Section 208.9 provide for exclusion of the type of gain herein involved.

(4) Section 210.8 of the tax law provides, in part:

"If it shall appear to the tax commission that any business or investment allocation percentage determined as hereinabove provided does not properly reflect the activity, business, income or capital of a taxpayer within the state, the tax commission shall be authorized in its discretion, in the case of a business allocation percentage, to adjust it by (a) excluding one or more of the factors therein, (b) including one or more other factors, . . . (c) excluding one or more assets, . . . or (d) any other similar or different method calculated to effect a fair and proper allocation of the income and capital reasonably attributable to the state, . . . "

The State Tax Commission hereby

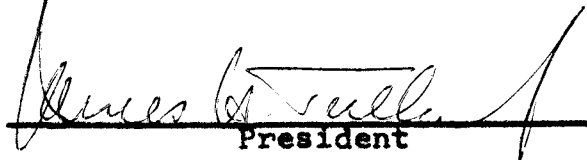
DECIDES:

(A) Since the capital gain at issue was not reported as taxable income to any other state, there is no basis for an equitable adjustment excluding it from entire net income. In the absence of an equitable adjustment, the principle of conformity prescribed in Section 208.9 requires that entire net income for New York State franchise tax purposes be based on the same income as is taxable for federal purposes.

(B) Accordingly, taxpayer's petition for refund is denied.

Dated: Albany, New York
this 16th Day of May 1975.

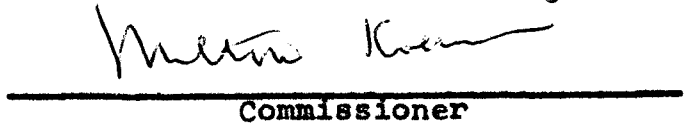
STATE TAX COMMISSION



President



Commissioner



Commissioner